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No. 84-1528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

G. HUGH WAMBLE, *et al.*,
Cross-Appellants-Appellees,
v.
WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,
Appellees.

and

G. HUGH WAMBLE and VERLINE COBBINS, *et al.*,
Cross-Appellants-Appellees,
v.
DEMPSTER and PAULINE FERGUSON, *et al.*,
Appellees.

On Appeal From The United States District Court For The Western District Of Missouri

CROSS-APPELLANTS-APPELLEES' BRIEF OPPOSING CROSS-APPELLEES' MOTIONS TO DISMISS OR REMAND

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This Brief is filed in response to the Motion to Dismiss or to Vacate and Remand filed with this Court by counsel for cross-appellees Dempster and Pauline Ferguson, et al., and the Motion to Vacate and Remand filed by the Solicitor General on behalf of the Secretary of Education.

The government, in its Motion to Vacate and Remand, and counsel for cross-appellees Dempster and Pauline Ferguson, contend that a decision of this Court in *Aguilar* v. *Felton*, Nos. 84-237, 84-238 and 84-239 (question of jurisdiction postponed to hearing on merits, October 9, 1984), should control as to the instant case. Cross-appellants Wamble, et al., of course agree that if the Court strikes down Title I in *Aguilar*, that would be dispositive; however, the reverse is not true. It is clear the facts developed in this case, after extensive discovery and a 21-day trial, provide a record substantially at odds with the "record" developed in *Aguilar*. (*See* Motion to Affirm filed by Appellees Wamble, et al., pp. 23-29.)

Clearly the facts developed in the instant case are much different from those appearing in the record in *Aguilar*.[1]

The position of the Secretary of Education and appellants Aguilar, et al., in the *Aguilar* case is that the holding of this Court in *Meek* v. *Pittenger*, 421 U.S. 349 (1975),

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[1] The Solicitor General, in his Jurisdictional Statement in *Aguilar*, found it important to note that the Title I rooms in the New York program were free from any religious symbols (Jurisdictional Statement in *Secretary, United States Department of Education* v. *Felton*, p. 9). Similarly, counsel for appellees Aguilar, et al., in Brief for Appellees, proclaims:

> There is no evidence in the record of this case that Title I services have been provided in any private school room containing a religious symbol, painting, statue, or artifact.

(Brief for Appellees Aguilar, et al., p. 10) Clearly, in this regard the record in *Wamble* is substantially different.

should not be considered controlling in *Aguilar* because the dangers of administrative and political entanglement, which concerned the Court in *Meek*, had not been demonstrated in the New York Title I program. (*See* Jurisdictional Statement in *Secretary, United States Department of Education* v. *Felton*, pp. 10-11, 15-17 and the Brief for Appellants in *Aguilar*, pp. 22-23, 38-39.)

A review of all the briefs in the *Aguilar* case demonstrates that if the Court should reverse the court of appeals in *Aguilar*, such a determination should not, *ipso facto*, result in a denial of plenary consideration of *Wamble*. Appellees in *Aguilar* freely admitted that the *Aguilar* case was presented to the trial court on the strength of *Meek* v. *Pittenger*. Appellees in *Aguilar* thus suggested that if the Court did not apply *Meek* in determining *Aguilar*, the case should be remanded to develop a record on the actual experience of the New York City plan.[2]

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[2] Counsel for appellees in *Aguilar* stated in their brief before this Court:

> Appellees' position, adopted by the court of appeals, serves to answer appellants' argument that the Court reversed the burden of proof in this case. Such is not the fact. Appellees met that burden under *Meek* and the other precedents when they laid before the Court the contours of a plan which, on its face, created a sufficient potential for excessive entanglement. They did not even attempt to meet the burden that would have been imposed by appellants' theory — i.e., before a plan may be held to be invalid under the entanglement test, it must be shown to have actually generated controversy or constitutionally impermissible conduct. This being so, in much the same way as the Secretary has asked the Court to override *Meek* and the other precedents should the Government prove to have been wrong, appellees ask the Court to remand this case in order to give them an opportunity to develop a record on the true, actual experience of the New York City plan should they prove to have been wrong.

(Brief of Appellees in *Aguilar* v. *Felton*, p. 49, n. 20)

The Solicitor General, however, opposed the suggestion of remand made by appellees' counsel in *Aguilar* claiming that, "Appellees had a full opportunity to adduce whatever evidence they deemed relevant." (Reply Brief for Secretary of Education in *Aguilar* v. *Felton*, p. 8) Not only did the Solicitor General oppose a full factual record in *Aguilar*, but he suggested that the Court not look at the evidence adduced in the Title I case then pending in *Wamble* which was at odds with the "record" in *Aguilar*. (Reply Brief for the Secretary of Education in *Aguilar* v. *Felton*, p. 8, n. 7)

The United States District Court for the Western District of Missouri has devoted a substantial amount of time to the development of a full record concerning the actual operation of a Title I program as it functions throughout the State of Missouri. This record is immediately available for this Court's consideration. It would be a substantial waste of judicial energy to fail to review that record, particularly when perhaps the underpinnings of precedential decisions of this Court are at stake.

In addition, this Court has repeatedly criticized religion cases coming before this Court on a meager record, such as is the record in *Aguilar*, e.g., *Board of Education* v. *Allen*, 392 U.S. 236, 248 (1968).

Cross-appellees have suggested that the Court remand this case for further proceedings citing *Dandridge* v. *Williams*, 397 U.S. 471, 476, n. 6 (1970). However, it is apparent that none of the considerations existent in the cases cited in *Dandridge* is present here.

This case is currently before the Court because cross-appellees Secretary of the United States Department of Education and Dempster and Pauline Ferguson, et al., invoked this Court's jurisdiction under Title 28 U.S.C.

§ 1252. That provision allows for a prompt and speedy determination when the constitutionality of an act of Congress has been found to be unconstitutional on its face or as administered and applied. Section 1252 indicates a desire on the part of Congress that the whole case come before the Supreme Court for review, including other issues which would not have otherwise resulted in direct appeal from the district court. *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981); *United States* v. *Christian Echo Ministries, Inc.*, 404 U.S. 561, 563 (1972); *United States* v. *Raines*, 362 U.S. 17, 20 (1960).

None of the questions raised on cross-appeal is collateral to the question of the constitutionality of the statute as administered and applied. Both the government and cross-appellees Dempster and Pauline Ferguson, et al., have contended that Title I is constitutional in part because it provides benefits to students and not to religious institutions. In addition, under First Amendment analysis, in order for a statute to be declared constitutional, the receipt of governmental benefits may in no way depend upon a religious test, and any educational rule governing access to public educational facilities or benefits must be in terms of a criterion which is religiously neutral.

In addition to Wamble, the plaintiffs in this case are federal taxpayers and include seven parents of public school students eligible to receive Title I assistance (Jurisdictional Statement of Cross-Appellees Dempster and Pauline Ferguson, et al., p. 5). These parents of eligible Title I students have standing to challenge a Title I program administered in a manner which gives unequal treatment favoring nonpublic school students. They also have standing to challenge a Title I program that has the effect of reducing the opportunity to receive Title I benefits unless a child enrolls in and agrees to submit to the religious practices and policies of a church school.

Of interest is the fact that cross-appellees do not and cannot make the same argument in this case that was made by counsel for appellants in *Aguilar* that "Title I extends its benefits equally to *all* eligible children regardless of the school they attend," thus maintaining that the child benefit theory of *Allen* should control. Of interest is the fact that counsel for the appellants in *Aguilar*[3] noted that the record established in the New York Title I program adherred to the statutory requirement that expenditures for children receiving Title I aid in private schools must be equal to expenditures for children enrolled in public schools, concluding that under the New York program whether a child attends public or private is irrelevant to the level of services he receives. (Brief for Appellants Aguilar, et al., p. 32, n. 37)

Of course, unequal treatment of public school students, as against nonpublic school students, is constitutionally relevant. In addition, the fact that Title I benefits are not provided for all eligible nonpublic school students also demonstrates that the program does not in fact provide aid only for the child, but rather is a direct benefit to the school. Thus, the fact that in Missouri only those nonpublic school students attending Title I schools, which have entered into an agreement with the government's agent to provide facilities on its premises in accordance with the dictates of the government, may participate in Title I is constitutionally relevant to the application of the child benefit concept as a saving theory.

Finally, whether the government's agent was incorporated for ostensible secular purposes cannot save a pro-

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[3] Counsel for appellants in *Aguilar* is the same as the counsel for appellants Dempster and Pauline Ferguson, et al., in the instant case.

gram from constitutional attack if the government's agent is operating in a manner in which the government itself may not operate. If the government must provide a Title I program which is free from, and appears to be free from, sectarian influences, sponsorship, support and involvement, then the government's agent can be held to no less a standard.

Cross-appellants agree with the statement of the government appearing in its Jurisdictional Statement in *Secretary, United States Department of Education* v. *Felton*, to the effect that related cases will illumine each other and give the Court an opportunity to give comprehensive and informed consideration to the issues presented. The government was correct when it indicated in that case that important considerations, not unlike those here, do in fact militate in favor of considering such a related case on plenary briefs and argument rather than simply holding it for disposition in light of the Court's eventual decision in the case first brought before this Court (*see* Jurisdictional Statement in *Secretary, United States Department of Education* v. *Felton*, p. 18). If that argument was valid in *Aguilar*, it is equally valid here where the record is probably the most extensive record of any parochiaid case yet brought before this Court. The theory and contention of the government, as developed outside of the combat of trial in *Aguilar*, has been put to the test in *Wamble* and has been found wanting.

As it was appropriate for this Court to give plenary consideration in *Aguilar*, after agreeing to give plenary consideration in *School District of the City of Grand Rapids* v. *Ball*, No. 83-990 (*cert. granted*, Feb. 27, 1984), it is equally appropriate that the Court give plenary consideration to the instant case before crossing the Rubicon on church-state aid.

CONCLUSION

This Court should grant plenary consideration of the cross-appeal in the event that the Court does not summarily affirm the decision of the district court in this action. Cross-appellees' Motions to Dismiss or to Vacate and Remand should therefore be denied.

Dated: June 4, 1985

Respectfully submitted,

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